No. 13,692

IN THE

United States Court of Appeals

For the Ninth Circuit

DAVID DON SCHUMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant, David Don Schuman, was indicted by the Grand Jury on September 4, 1952 for knowingly refusing to submit himself to induction (Tr. 3-4; see Appendix A). In conformity with Rule 23 of the Rules of Criminal Procedure appellant on September 24, 1952 waived trial by jury and requested that his case be tried before the Court (Tr. 6). On October 17, 1952 appellant was tried in the United States District Court for the Northern District of California, Southern Division, the Honorable Monroe M. Friedman, District Judge, presiding.

On November 7, 1952 the defendant was adjudged guilty of a violation of Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a) (refusal to submit to induction). Appellant was sentenced to a period of 18 months in an institution to be designated by the Attorney General (Tr. 10). On November 12, 1952 appellant filed a notice of appeal herein (Tr. 11-12).

The jurisdiction of this Honorable Court was invoked under Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant herein registered for Selective Service on September 17, 1948 (page 1, Selective Service file, Exh. 1, et sequitur).[1] On July 25, 1951 the District Coordinator of the Selective Service System advised Local Board No. 40 that appellant had been registered in the wrong Local Board and should have been registered in Local Board No. 38. Thereafter, his file was forwarded to Local Board No. 38.

Appellant was classified I-A on September 11, 1951 by said Local Board No. 38. On September 21, 1951 the registrant requested a personal appearance. On October 8, 1951 defendant was continued in Class I-A after a personal appearance before the Board in which he requested classification as an ordained minister or as a conscientious objector.

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[1]The Selective Service file will hereinafter be designated as the "file".

On April 15, 1952 a hearing was held before a Hearing Officer of the Department of Justice pursuant to Section 456 of Title 50, Appendix, U.S.C. (Tr. 135). Thereafter, on August 7, 1952 appellant was continued in Class I-A by a vote of 3 to 0 by the Appeal Board (Panel 3 for the State of California) (page 110, file). On August 12, 1952 appellant was ordered to report for induction (page 133, file). In compliance with this order, on the 28th day of August, 1952, appellant completed all processes of induction except to obey the order to take the final step forward, which he was instructed would constitute his induction into the Armed Forces (Tr. 44). (Those facts which bear upon the basis of the Selective Service System's findings will be designated in the main body of the argument.)

At the trial demand was made for the production of a Federal Bureau of Investigation report which was furnished the Hearing Officer of the Department of Justice (Tr. 70). The Trial Court held that this report was not material to the issues involved in the case (Tr. 70).

QUESTIONS INVOLVED.

The only questions involved are:

1. Was there a basis in fact for appellant's I-A classification?

2. Did the Department of Justice proceed properly in making its recommendation?

3. Did the trial Court properly refuse appellant's request for the F.B.I. reports concerning him?

SPECIFICATION OF ERRORS.

Appellant specifies error as follows:

1. Denying appellant's motion for judgment of acquittal.

2. Failing to hold that the classification by the local board of I-A instead of either IV-D or I-O was without basis in fact and arbitrary and capricious.

3. Failing to hold that the Hearing Officer designated by the Department of Justice denied the claim of appellant for classification as a conscientious objector on artificial and illegal standards and beyond the jurisdiction set forth in the Regulations.

4. Failing to hold that the Department of Justice's recommendation denying appellant a conscientious objector status and the subsequent action by the Appeal Board in reliance thereon, were without basis in fact, arbitrary and capricious, and based upon an artificial and illegal standard.

5. Failing to require the Department of Justice to produce the secret F.B.I. report which was used by the Hearing Officer in making his recommendation against defendant, thereby denying to defendant his right to be confronted by and cross-examine witnesses against him.

SUMMARY OF ARGUMENT.

I.

Courts have no power to weigh the evidence to determine whether a classification made by the draft board is justified. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant. In the instant case appellant was a college student at the time of his hearing before the Department of Justice. The evidence demonstrates he neither occupied a position analogous to regularly ordained ministers of older and better known religious denominations or pursued a full time course of instruction in a recognized theological or divinity school. There was basis in fact for denying a IV-D (minister) classification.

II.

The times at which defendant, first, became seriously interested and, second, ordained in the ministry form a suspicious circumstance, since he became seriously interested in Jehovah's Witnesses shortly after registering for the draft and became an ordained minister shortly after the outbreak of the Korean war. The burden is upon the registrant to demonstrate that he is clearly within the class exempted from service in the Armed Forces. The Hearing Officer was in a position to observe the appellant and was not convinced of a conscientious opposition on his part to participation in war. There was evidence before the Appeal Board sufficient for a basis in fact for his classification.

III.

The Department of Justice did not deprive appellant of any guaranteed rights. The Department does not classify. It merely investigates a conscientious objector, and makes recommendations and a report to the Appeal Board.

Its use of the words "deep seated" in the covering letter accompanying the Hearing Officer's report was sanctioned by judicial usage and not prejudicial to the defendant.

A fair reading of the Hearing Officer's report does not bear out appellant's claim that he proceeded on a theory that long participation in a religion opposed to war was necessary for exemption.

IV.

The defendant was not entitled to access to the Federal Bureau of Investigation report since it was not material to any issues in the case. In addition, the Supreme Court in *United States v. Nugent,* Infra, held that in Selective Service proceedings there is no right to subpoena such reports.

ARGUMENT.

I. THE BOARD HAD BASIS IN FACT FOR DENYING APPELLANT'S CLAIM FOR EXEMPTION AS A MINISTER.

Exemption from the duty of service in the Armed Forces is not a matter of constitutional right (*Imboden v. United States,* 194 F. (2d) 508; *George v. United States,* 196 F. (2d) 445; *Roodenko v. United*

States, 147 F. (2d) 752). Exemption springs from statute. Who is within the exemption must be determined by the terms of the Congressional grant. Congress provided that regular or duly ordained ministers of religion and students preparing for the ministry, as defined by the Universal Military Training and Service Act, shall be exempt from training and service. The burden is on the registrant to bring himself clearly within the exempted classification. (*Swaczyk v. United States,* 156 F. (2d) 17).

It is universally admitted that Courts have no power to classify one indicted for violation of the Selective Service law (*Cox v. United States,* 157 F. (2d) 787, 789). The body which is authorized to make the factual determination as to whether a registrant comes within the classification is the local draft board (*Estep v. United States,* 327 U.S. 114, 122-123).

As said in *Cox v. United States,* 332 U.S. 442, 448-452,

> "The provision making the decisions of the local board 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

The *Estep* case, supra, held that a Court may not interfere with the decision of a Selective Service System except in a case where the board acted without jurisdiction because there was no factual basis whatever upon which it could proceed. The Supreme Court held at page 451 that when only a small period of time was spent as a minister, "this fact alone" was enough to justify the board denying a minister's classification.

In the instant case the defendant is a member of Jehovah's Witnesses, all members of which claim to be ministers of religion. It cannot be supposed that a registrant's word alone is determinative of this question. In *Martin v. United States,* 190 F. (2d) 775, 777, it was said:

> "Congress undoubtedly intended to exempt such persons as ~~students~~ stand in the same relationship to the religious organizations of which they are members, as do regularly ordained ministers of older and better known religious denominations."

In the instant case the defendant was apparently attending San Francisco City College with a view to obtaining a degree in philosophy at the time of his hearing before the Hearing Officer of the Department of Justice (page 131, file). Appellant apparently attends a lecture given by another minister at a main meeting place of Jehovah's Witnesses at Kingdom Hall on Sundays (page 95, file). The time apparently devoted to ministerial studies seems to be one hour on Friday nights, Sunday public lectures, and home study of the Bible (page 96, file). Although appellant tes-

tified before the Board that he occupied the position of overseer in the Jehovah's Witnesses organization (page 92, file), a reading of the transcript of the testimony before the Local Board (pages 90 to 98, file) seems to justify an inference that appellant occupied an intermediate rather than a principal ministerial assignment. His main tasks seem to be soliciting converts in the Mission district (page 94, file) and delivering lectures to groups of people numbering no more than seven (page 94, file).

Section 456(g) of Title 50 U.S.C. provides that only

> "students preparing for the ministry under the direction of recognized churches or religious organization, who are satisfactorily pursuing *full time* courses of instruction in recognized theological or divinity schools * * * shall be exempted from training and service." (Italics supplied.)

Since the Hearing Officer found evidence that the defendant was studying at City College of San Francisco aiming towards a degree in philosophy, it is submitted that there was evidence before the Appeal Board justifying the inference that the defendant was not enrolled in a full time recognized divinity school even though he testified to his attendance at the Mission Unit of Theocratic Ministry School of Jehovah's Witnesses. Under the law as it now stands the Board had a basis in fact for its classification, and the District Court could have come to no other conclusion than it did.

II. THE LOCAL BOARD HAD BASIS IN FACT FOR DENYING APPELLANT EXEMPTION AS A CONSCIENTIOUS OBJECTOR, CLASS I-O.

The appellant registered for the draft in September, 1949. At that time he did not answer any questions regarding any claim of conscientious objection to combatant training and service in the Armed Forces of the United States. He testified that he became an ordained minister of Jehovah's Witnesses on September 3, 1950 (page 90, file). It must be remembered that the Korean war began several months prior to that time. Another coincidence is involved in the time at which his Jehovah's Witnesses study began. He testified that he began to seriously study this religion in November, 1949, approximately two months after he registered for the draft (page 15, file).

The Local Board and the Hearing Officer of the Department of Justice were in a position to observe the defendant's demeanor and to take cognizance of all those intangible factors which are involved when a witness is before a tribunal in person. They came to the conclusion that appellant was not, by reason of religious training and belief, conscientiously opposed to participation in war in any form. The burden is upon the registrant to demonstrate that he is clearly within the exempted class (*Swaczyk v. United States,* Supra; *Seel v. United States,* 133 F. (2d) 1015). In *United States v. Annett,* 108 F. Supp. 400, a finding that the defendant did not have the humility ordinarily incumbent to conscientious objection to war was held a sufficient basis in fact for a determination

that the defendant was not conscientiously opposed to war.

It is submitted that the facts which may be found in appellant's file give more than a reasonable basis to the Selective Service System's classification. The Hearing Officer's conclusion in his report was obviously a determination that although defendant was apparently religious, he had not convinced the Hearing Officer that this religious belief rose to the standard required by Section 456(j) of Title 50 U.S.C. Even if this Honorable Court should come to a different conclusion, nevertheless the scope of review which Congress gave over the Federal determinations of the Selective Service Boards requires it to sustain the present determination.

The finding of the Hearing Officer of the Department of Justice is, of course, only advisory. The Hearing Officer's report is merely a recommendation, and the Board of Appeals is not required to accept it (*Imboden v. United States,* Supra). A reading of the Department of Justice report demonstrates that this officer was far from believing that the character and good faith of the objections of Mr. Schuman justified a finding that he was conscientiously opposed to participation in war in any form (pages 130 to 132, file).

We submit to this Court the conclusion of United States District Judge Monroe M. Friedman who tried the case:

> "The question before the Court is not whether the preponderance of the evidence would be in

favor of a conscientious objector; the Court is not permitted under the laws to indulge in that. All this Court has to decide is as to whether or not there is any basis in fact whatsoever, and from all of the evidence presented there is no conclusion that the Court can come to except there is a basis in fact.

"It might very well be, if this Court were sitting on a Board—as a matter of fact, I did sit on a Board many years ago. Many of these cases I found for exemption as a minority member, but I am not permitted to do that now in this case, and the law has to be followed.

"It is therefore the duty of this Court and the Court does find the defendant guilty."

III. THE DEPARTMENT OF JUSTICE DID NOT DEPRIVE APPELLANT OF ANY RIGHTS GUARANTEED TO HIM BY LAW.

The recommendation of the Department of Justice is not binding upon the Appeal Board (*Imboden v. United States,* Supra). When the Appeal Board reviews the case it reviews *de novo* and its classification supersedes any other action (*Cramer v. France* (9th Cir.), 148 F. (2d) 801).

Appellant here is not complaining that the Hearing Officer made his decision on any matter not before the Appeal Board. His only objection goes to the Department's use of the words "deep seated" in the covering letter which accompanied the Hearing Officer's report. These particular words have been used by the Federal judiciary (see *United States v. Bouziden,*

108 F. Supp. 395, 397). It would seem that Congress would not have intended to exempt persons with light and transient objections to war. The word "conscientious" in the context in which it is found in the Selective Service statute would seem to impel the conclusion that deep seated conscientiousness is meant. However, the conclusion of the Hearing Officer is expressed at page 132 of Government's file in perhaps less confusing terminology. The recommendation of the Department of Justice was obviously based upon this report, and the Appeal Board not being bound by the recommendation would naturally go to the substance upon which it was based.

A fair reading of that substance reveals that the basis of the Hearing Officer's conclusion was not that length of time is a requirement for conscientious objector status but that length of time is one extrinsic factor in determining whether or not a defendant sincerely holds the views required by statute for exemption. As has been previously pointed out the times that this appellant became first interested and then converted form a suspicious circumstance bearing beyond his belief. The judgment of the Hearing Officer was, fairly read, that despite some showing to the contrary by appellant, he could not find the conscientiousness required by statute.

IV. THE DISTRICT COURT DID NOT ERR IN REFUSING APPELLANT ACCESS TO THE FEDERAL BUREAU OF INVESTIGATION REPORT.

Order 3229 of the Department of Justice provides that whenever an officer or employee is served with a subpoena to produce official files or documents, he shall decline to furnish the information in the absence of instructions of the Attorney General to the contrary. The general rules concerning the availability of FBI reports are discussed in *Touhy v. Ragen,* 340 U.S. 462. In that case the Supreme Court decided that in no event could a defendant secure such reports unless necessity to the defense outweighed the interests of the public in secrecy and unless they were material to important matters properly in issue in the case. *United States v. Nugent,* 346 U.S. 1, has held that registrants in a Selective Service case are not entitled to the use of FBI reports. In addition, the District Court, after examination of the reports in question, found that there was nothing in them material "as far as the issues of this case are concerned" (Tr. 70).

Inasmuch as the trial Court read the reports and found they were not material to the defense and in view of the *Nugent* case, it is submitted that no error in this ruling has been shown.

V. CONCLUSION.

For the reasons hereinabove set forth the United States submits that no error has been shown in the conviction of David Don Schuman. Accordingly, the United States requests that the judgment be affirmed.

Dated, San Francisco, California,
August 14, 1953.

Respectfully submitted,

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Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

EXHIBIT A

INDICTMENT

(Violation: Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a).)

The Grand Jury charges: THAT

DAVID DON SCHUMAN,

defendant herein, being a male citizen, of the age of 22 years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the "Selective Service Act of 1948", as amended by Public Law 51 of the 82nd Congress, approved June 19, 1951, known as the "Universal Military Training and Service Act", hereinafter called "said Act", and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 38 of the Selective Service System in the City and County of San Francisco, State of California, which said Local Board No. 38 was duly created, appointed and acting for the area of which the said defendant is a registrant, did, on or about the 28th day of August, 1952, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class I-A,

and having theretofore been duly ordered by his said Local Board No. 38 to report at San Francisco, California, on the 28th day of August, 1952, for induction into the Armed Forces of the United States, and having so reported, did then and there knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States as provided in the said Act, and the rules and regulations made pursuant thereto.

A True Bill.

EXHIBIT B

STATUTES

The applicable statutes read as follows:

Title 50, Appendix 456 (j)

"Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health,

safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462, of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inqury, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work

contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]."

Title 50, Appendix 462(a).

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-454 and 455-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the

requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [said sections] unless such person has been actually inducted for the training and service prescribed under this title [said sections] or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [June 24, 1948]. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall, upon request of the Attorney General, be advanced on the docket for immediate hearing.